

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON 25, D. C.

October 15, 1947

Mr. F. J. Bailey
Assistant Director
Legislative Reference
Executive Office of the President
Bureau of the Budget

Dear Mr. Bailey:

This is in further reference to your letters of August 26, 1947, submitting for our consideration and comment two proposals by the Departments of Navy, War, and Justice, for amendment of Section 605 of the Communications Act of 1934. It will be recalled that Section 605 contains prohibitions against the unauthorized interception and divulgence or use of wire or radio communications of a private nature, which would include, for example, wire tapping and the use of information so obtained, and against the unauthorized divulgence by organizations, such as telephone and telegraph companies, of the existence of contents of private communications transmitted through their facilities. Enactment of either of the proposals advanced by the Navy, War, and Justice Departments as national security measures would have the effect, inter alia, of making these prohibitions contained in Section 605 inapplicable in inquiries and investigations made by those Departments pertaining to the national security. The following comments upon these proposals are submitted for your consideration.

Practices such as those prohibited under Section 605, particularly wire tapping, have thus far been generally regarded in this country with great disfavor. Although the Supreme Court in Olmstead v. United States, 277 U.S. 438, held that the use of evidence of private telephone conversations, intercepted by means of unauthorized wire tapping, did not constitute a violation of the Fourth and Fifth Amendments to the Federal Constitution, vigorous dissents to this holding were registered by Justices Holmes, Brandeis, Butler and Stone. Moreover, the policy underlying these dissents was subsequently enacted into law by the adoption of Section 605 of the Communications Act and that policy has been continued in effect until the present. In Nardone v. United States, 302 U.S. 379, the Supreme Court in a strongly worded opinion held that government employees, including law enforcement officials, were included among the persons who were forbidden by Section 605 to engage in the practice of wire-tapping. On numerous occasions since enactment of Section 605 and announcement of the decision in the Nardone case in 1937, legislation has been proposed under which limited wire tapping and interception of radio communication by law enforcement officers would have been authorized (S. Res. 97, 77 Cong.; H. R. 2266, 77 Cong.; H. R. 6919, 77 Cong.; H. R. 4228, 77 Cong.; H. J. Res. 273, 77 Cong.;

H. J. Res. 283, 77 Cong.; H. J. Res. 304, 77 Cong.; H. J. Res. 31, 77 Cong.; H. J. Res. 41, 78 Cong.) None of these proposals were enacted, and this was true even though in many of these bills far more stringent conditions were proposed to be attached to the relaxation of Section 605 than is provided in the present proposals and even though at least six of the bills were introduced during the time this country was actually at war, several of which proposed the relaxation of Section 605 for only a limited period—i.e. not beyond the duration of the war and six months thereafter. It is thus clear that there may be grave question whether conditions have so changed as to require adoption of a policy for the cases covered by the proposed amendments directly contrary to that which has prevailed until now, and having so obviously serious an impact upon basic civil liberties now protected by law.

In the event the facts should show a recommendation to relax the present provisions of Section 605 to be advisable, it is believed that there are several aspects of the two proposals under discussion which warrant particular attention. With respect to the purposes for which action without regard to the prohibitions contained in Section 605 would be authorized and the limitations that may be applicable to the taking of such action, the proposal of the Navy Department provides very broadly that Section 605 of the Communications Act would be inapplicable when "the interests of national security" are involved. Authority would be vested in the President to issue rules and regulations governing utilization by the several authorized agencies of the authority that they would derive from the proposed amendment. This language is so broad that in practice a virtually complete nullification of Section 605 would be possible. The language in the proposal of the Department of Justice is somewhat more specific. Thus, under that proposal the prohibitions in Section 605 would be inapplicable in connection with investigations of interference with national security and defense by treason, sabotage, espionage, seditious conspiracy, violation of Neutrality laws, violations of the Act requiring the registration of agents of Foreign Principals, violations of the Act requiring the registration of organizations carrying on certain activities within the United States, "or in any other manner."

But for the catch-all words "or in any other manner", it would be apparent that the proposal of the Department of Justice is designed to have application only with respect to the investigation of specific offenses in violation of specific statutes. In past bills dealing with the same subject matter as the proposals here under discussion, resort to such practices as wire-tapping has been proposed in certain categories of cases only upon reasonable suspicion of a violation of law. Moreover, in order to avoid abuse of this provision some of these bills have contained the added requirement that the Attorney-General certify in each case the basis for any such suspicion, and that such certification remain on record. If an amendment to Section 605 is deemed essential, the proposal of the Department of Justice should be modified to eliminate the catch-all provision and restrict the application of that proposal to cases in which there is a reasonable basis for suspecting violations of specific statutes referred to.

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From the explanatory note contained in the submittal of the Department of Justice, the objective of that agency in advancing its legislative proposal, insofar as Section 605 is concerned, appears to be only to relieve the investigative agencies concerned from the restrictions of Section 605 in the investigation of cases falling within the scope of that proposal. It may be pointed out, however, that actually the language of the Justice proposal may be susceptible of a much broader interpretation. Even in the absence of Section 605, persons having possession or knowledge of private communications would be under no legal obligation to deliver such messages or information concerning them to investigators conducting a preliminary inquiry in a case which has not reached a more formal stage, such as presentation of the case to a grand jury on the basis of specific charges. However, under a broad interpretation of the language contained in the proposal of the Department of Justice, evidence and information concerning wire and radio communications believed by the investigative agencies to pertain in some way to matters covered by the proposal would be treated differently from any other possibly relevant evidence or information in that there would be a legal obligation upon the possessor to reveal and deliver the evidence with respect to wire and radio communications to the investigative agencies, even during the early preliminary stages of the investigation and without the necessity of a subpoena or search warrant. Of course, such a requirement would go far beyond relaxation of the prohibitions in Section 605. Under this broad construction, for example, it might also be contended that representatives of the investigative agencies would be authorized to visit the home of a suspect and without a warrant or other authority require that copies of certain messages be turned over to them. Such a broad interpretation would, of course, present basic questions of a constitutional nature.

In accordance with your request, the enclosures accompanying your letters of August 26, 1947, are returned herewith. Please advise us of any further assistance that we may render in this matter.

By Direction of the Commission.

/s/ Charles R. Denny

Charles R. Denny
Chairman

Enclosures

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ORIGINAL DOCUMENT MISSING PAGE(S):

Enclosures